

This is a compilation of comments submitted by the Bulletin 160-03 Public Trust Workgroup. It includes comments submitted up to October 29, 2003.

1. Practical Significance:

- a. In general, I feel that B-160 still fails to provide enough discussion to enable the general reader to understand the practical significance of the Public Trust Doctrine. ... How might “supervision” be carried out? What mechanisms are available to “protect... where feasible”? A possible source of additional material is the “Initial Discussion Document” circulated earlier by Greg Weber; or Virginia Cahill could be coaxed into greater loquacity for this single non-precedent-setting task; or we could as a minimal measure resurrect the bullet points that once appeared in Chapter 6. (Another commenter liked the old bullet points better as well: “I think the old set of bullet points originally proposed for Chapter 6 helped clarify the intent and context of the public trust more than current language and would be a useful addition to the present draft.”)
- b. (Staff comment) It would be very productive to hear what PT values people feel are being (or are in jeopardy of being) compromised under the auspices of current CA water management practices, law and processes. Specific physical examples would be best such as in-stream flows, water quality, terrestrial habitat, etc.) This will help focus the discussion and perhaps help us all gain insights into how we can regard, analyze or protect PT differently.

2. Who will do the considering? In general, the new management strategy narratives note that public trust will (or at least should) be considered, but nothing is said about who will do the considering, when or at what stage, or how and in what detail. This makes it difficult for interested parties to understand and monitor the process, and it may result in interagency confusion about responsibility. If there’s in fact more of a plan than is evident, it should be made explicit; if there isn’t much of a plan yet I suggest that there should be.

3. Few recommendations: In most of the recent management strategies drafts, the public trust text appears in the preliminary sections, with nothing in Recommendations. This suggests that we think the current approach to public trust supervision is adequate now and will continue to be adequate as we gain 17 million more Californians and devolve decisionmaking responsibility to regions. I don’t think this...

4. Buying Back Heritage?

- a. Perhaps one of the most important issues in protecting trust assets is preserving them from conversion to exclusive private use. Aggressive and un-nuanced pursuit of some of the strategies described in Chapter 5 risks the effective

surrender of public supervision, effectively treats public interests in water as private property and even sometimes seems to suggest that having the public buy back their own heritage at current market prices is an acceptable proposition. In limited circumstances, this might well be appropriate, but on a programmatic basis, there is not enough money in our economy to make this possible.

- b. Once allocations of surface water supplies are made by state or federal agencies, the public trust was already considered in making those allocations. The water is ultimately delivered to and paid for by private parties. It is neither necessary nor desirable to consider the public trust again just because the water was used in the private sector to generate economic values, either immediately or in future years via conjunctive use. Current trends suggest that public trust values are enhanced by the public sector "buying back its heritage" via EWA purchases of stored groundwater.
 - c. The issue of "overallocation" of water rights simply does not strike me as a topic that should be taken up by the Water Plan. That is just one opinion, but I am confident that a poll of the AC participants would reveal that I'm far from alone on this. The legal implications of addressing "overallocations" are very large because it involves established water rights. It also does not change the size of the state's water pie, only who gets how much. I recognize that who gets how much is very much at the heart of the public trust. Discussion of the state's public trust responsibilities in this context is appropriate for the Water Plan. I read Michael's (and your) comments to suggest that even more public trust scrutiny is needed, even after the water rights have been allocated and used. If I have erred in my understanding then please advise. Regarding overallocation of water rights, this AC member feels there are too many mines in that field for the Water Plan to successfully walk through.
 - d. While the notion of over allocated water supplies may be a matter of public trust, I think we need to clarify what it is we mean in that context. Are we simply restating that, or are we calling for a higher standard. If the latter, what is it based upon?
5. **Public Trust is more than a balancing:** it seems a bit strange to evaluate and balance environment, urban and agricultural uses on the same plane in the California Water Plan. In many ways, this sentiment reflects the essence of the public trust doctrine. The vitality of natural systems and the sustainability of human uses are primary. California's Supreme Court has recognized the traditional public trust notion that no-one can claim a vested right to use trust assets to the injury of trust values (though some uses will inevitably be approved that do indeed harm trust resources). A whole framework of guidelines is evolving that is intended to shape decisions on the margin that protect long term public interests in the preservation of the ecological basis for the resource systems upon which humans depend. Several years ago, the majority of the Supreme Court of the State of Hawaii found that while some "balancing" is required,

the state has a fundamental obligation to maintain a bottom line level of protection for natural resource systems.

6. **Trust, environment, and EJ confined in boxes:** From my perspective, a problem with the environmental and public trust language presently reflected in the California Water Plan is that it sometimes tends to obscure, confuse and confine to particular boxes the rise of environmental values, the sensitivity to environmental injustice and the development of the public trust doctrine. My concern at this point is not with a presentation of something "futuresque," but rather a perspective that conforms with existing law. This requires a clearer explanation of the public trust doctrine to readers of the California Water Plan.
7. **Duties not explained & managers not urged to duty:** I have concerns that public duties are not being adequately explained to the public and that trustee agencies are not being urged to take adequate action to protect either public beneficiaries or fulfill their obligations to future trustees by not too easily compromising future management options.
8. I appreciate the language inserted into the Chapter 5 introduction. As noted above, I feel that a little more general language needs to be offered, whether here or elsewhere. The next draft's treatments in other chapters may influence my ideas about Chapter 5.
9. **Conveyance and both Storages: issues without recommendations** identify (potential, generic) Major Issues of public trust but offer no associated recommendations, which is inconsistent with my understanding of B-160 editorial direction. Assuming the new text remains in Major Issues, I suggest that at a minimum Recommendations be added along the lines of "SWRCB (or DWR, or another specific agency) should make public an analysis of the public trust implications of each proposal prior to project approval". (Though it's not formally the business of the Public Trust Workgroup, it seems necessary to offer something similar as well for the other laws and processes referenced in the generic Major Issue- Area of Origin, etc.)
10. **System Re-op:**
 - a. Recommendations 1 and 2 for this strategy suggest that Somebody should review, and provide assistance to Somebody Else for evaluating, the possible impacts of System Re-op initiatives in several fields including public trust. I suggest that the Somebodies be identified and given specific responsibility for minding and representing public trust concerns.
 - b. a very short initial statement on public trust responsibilities could be strengthened by noting that the Mono Lake court also ruled that some public uses might receive enhanced protection over contemplated private uses and this revised the set of questions needing attention in reoperation decisions.

11. Water Transfers

- a. offers what I think is the only recommendation in the current crop of drafts to not only continue but “improve” the fulfillment of public trust responsibilities. I appreciate this. However, it appears under the heading (Recommendation #3) “...working through the CALFED Bay-Delta Water Transfers Program”, and it occurs to me that this might not provide for attention to transfers that may not need to pass through the Delta but which otherwise merit public trust consideration. I suggest that Water Transfers recommendation #3 be modified to clarify that attention will not be restricted to transfers of particular interest to CALFED.
- b. a concern in water transfers is that public interests in water will be treated as the private property of the "selling" water rights holder, and the problem is magnified by the historical over-allocation of water rights. The public should expect that public claims will have to be more aggressively defended as sellers move to market private claims on California's water. A water plan which does not acknowledge this institutional situation does not serve the long term public interest

12. **Watershed Management:** I appreciate the public trust language in the Benefits section. I think it would be appropriate to include some public trust mention in the Recommendations. It would be a simple matter to insert into the existing #6 or #5 the explicit idea that specific state agencies should identify and address public trust issues in or for watershed stewardship groups.
13. **Pollution Prevention:** note should be made of the fact that state agencies have enhanced responsibilities for protecting the condition of trust assets for trust uses. This duty is in addition to and independent of other regulations. It has specific relevance to "emerging pollutants" mentioned in the section. The state not only has authority under existing law, it has an obligation to take precautionary action to protect trust uses.
14. **Conjunctive Management:** there is a concern that public values in surface water systems protected by the trust might be converted into private property by management practices when water is introduced into some aquifers. What is being done to protect public values in this situation
15. **Recreation:** A major problem with recreation is that although there is a lot of money spent on recreation there is often little spent to protect the environmental resource from the impact of that recreation except in some dedicated areas. The recreational environment is often not protected from destruction by trash dumping, violations of public safety, fires, destruction of habitat, water pollution, protection of adjacent lands from damaging trespass, etc.